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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FCP/160399

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**PRELIMINARY RECITALS**

Pursuant to a petition filed September 08, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Department Family Care - MCO in regard to Medical Assistance, a telephone hearing was held on September 24, 2014.

The issue for determination is whether Milwaukee County Department Family Care was correct in their disenrollment of Petitioner from the Family Care program effective August 31, 2014 when Petitioner was no longer functionally eligible for the Family Care Program.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Kris Zimmer

Milwaukee County Department Family Care - MCO  
901 N 9th St  
Milwaukee, WI 53233

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Racine County.
2. Petitioner has been a recipient of Family Care (FC) benefits since April 2014. To remain eligible for FC, the recipient must periodically undergo functional screening to determine whether she

continues to have functional care needs at the requisite level. Petitioner underwent such a functional screening in July 2014.

3. As a result of the July 2014 functional screening, the FC program determined that Petitioner was no longer functionally eligible for the program. The FC agency issued notice to Petitioner advising her that she was no longer eligible for “nursing home level” FC benefits due to her failure to satisfy the nursing home related functional eligibility requirements of the program. Petitioner timely appealed.
4. Petitioner, age 37, has history of CVA/stroke when she was 21, COPD, Chronic Pain, Degenerative Disc Disease, Headaches, Insomnia, Pneumonia, and Urinary Tract Infections. Petitioner has numerous mental health diagnosis including anxiety, bipolar disorder with psychotic features, schizophrenia, depression, and post-traumatic stress disorder. Petitioner also has a history of substance abuse.
5. *ADLs*. The petitioner is ambulatory and independent in bathing, eating, toileting, transferring and grooming. Petitioner does not appear to have any physical limitations related to her physical conditions. She is not on any medication for her COPD, she does not demonstrate any pain when performing these tasks.
6. *Instrumental ADLs*. Petitioner’s medications are oral, and she is able to ingest them independently. She willfully chooses to take these medications incorrectly, but nonetheless can perform this task. Petitioner’s washer and dryer are broken, but she takes her laundry to her mother’s house where she reports completing that task. Petitioner is physically able to do household chores. Petitioner can manage her money for day to day transactions, although her mother monitors and manages her finances. The petitioner is capable of meal preparation. She is independent in the use of a telephone, and drives an automobile. The petitioner is not employed, and receives Social Security Disability benefits. She does not receive overnight supervision, however, the family care team indicated that this was an area of concern given Petitioner’s medication and willful mismanagement of those medications. Petitioner is fully communicative. Petitioner has demonstrated self-injurious behavior, including over 30 suicide attempts, and has engaged in substance abuse in the past. She has been hospitalized five times at St. Lukes in relation to her mental health issues since December 2013.

### **DISCUSSION**

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized under Wisconsin Statutes, § 46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10. See also, *Medicaid Eligibility Handbook* at §29.1 *et seq.*, available at <http://www.emhandbooks.wi.gov/meh-ebd/>. Whenever the local Family Care program decides that a person is to be terminated from the program, the client is allowed to file a fair hearing request. The petitioner did so here.

In order to qualify for FC services, with certain exceptions not applicable here, a person’s functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). Essentially, to meet the functional eligibility requirement, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

The Wisconsin Department of Health Services has made efforts to improve the statewide efficacy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience

working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience); who has been trained and met all requirements to do so by completing a Department sanctioned web-based training program, and have experience working with long term care consumers.

This screener asks the applicant, or a recipient at a periodic review, a multitude of questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits (as occurred here) the "Functional Screen Report" for the applicant to the Department's Division of Long Term Care. The Department then treats the Long Term Functional Screen data (or "tool") by computer programming to see if the applicant/recipient meets any of the nursing levels of care.

In the initial implementation of the "functional screen" process, the Department employed a statistical consultant to test the use of the "tool" (the Level of Care Functional Screen form, or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant prepared an academic report finding that the use of the functional screen resulted in a high degree of reliability and consistency. Current policy requires the Department's local agent to utilize this system. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The cross-referenced Level of Care (LOC) Functional Screen form reiterates the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities.

The petitioner's diagnoses are not in dispute. Petitioner had a CVA or stroke at age 21. Petitioner is now 37. Petitioner has COPD, but is not being treated medically for COPD. Petitioner has reported Chronic Pain, but also has a history of substance abuse. At times she rates her pain level as a 10 on a scale of 1-10, but shows no outward signs of pain. Petitioner's most significant limitations are her mental health issues. Since December 2013 Petitioner has been hospitalized five times at St. Luke's for her mental health related issues. Petitioner reported attempting suicide 32 times. The agency assessor determined on July 1, 2014, that the petitioner was able to perform all ADLs independently. When the petitioner's functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

I agree with the assessor's finding that the petitioner was capable of performing all ADLs in July 2014. The assessor notes that some of Petitioner's problems are self-induced. For example, Petitioner has self-induced hyperventilation related to her COPD. Although Petitioner has COPD she is not on any respiratory medications, and she continues to smoke. At times Petitioner will inhale rapidly and exhale noisily and appears to be hyperventilating, however, this is self-induced. The team saw Petitioner perform all of the tasks of daily living.

Another significant aspect of this case is that Petitioner chose not participate in this hearing. The undersigned ALJ called Petitioner at the phone number on file because Petitioner did not appear at the hearing in person as instructed. Petitioner agreed to participate in the hearing via telephone. During the hearing the undersigned ALJ instructed Petitioner not to interrupt FC when presenting their case, but that Petitioner would have an opportunity to tell her side. The undersigned ALJ believes that Petitioner hung up at that point choosing to no longer participate in the hearing. When it was Petitioner's turn to present her side, Petitioner was not there, and could no longer be reached. For these reasons, the undersigned ALJ has little information from Petitioner that would dispute the information provided by the family care team.

Independently of the DHS computerized result, this ALJ's overall sense of the petitioner's care level is that it does not rise to the "comprehensive functional capacity level" required in the state code. In code,

the verbally expressed standard, as opposed to a computer algorithm, for the requisite level of care is as follows:

**DHS 10.33 Conditions of functional eligibility.**

...

**(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY.** (a) *Determination.* Functional eligibility for the family care benefit shall be determined pursuant to s. [46.286 \(1\)](#), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under [par. \(b\)](#) shall be met and, except as provided under [sub. \(3\)](#), the functional capacity level under [par. \(c\)](#) or [\(d\)](#) shall be met.

(b) *Long-term condition.* The person shall have a long-term or irreversible condition.

(c) *Comprehensive functional capacity level.* A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

- 1. The person cannot safely or appropriately perform 3 or more activities of daily living.**
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
- 3. The person cannot safely or appropriately perform 5 or more IADLs.**
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
  - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
  - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

(emphasis added)

Wis. Admin. Code §DHS 10.33(2)(a)-(c) (November 2009). IADLs are defined at §DHS 10.13(2). The petitioner cannot perform one ADL unassisted (dressing), and cannot perform several IADLs unassisted (*e.g.*, money management).

In looking at the notes from the Long Term Care functional screen completed in July 2014, Petitioner is able to complete tasks of daily living. The screen indicates that Petitioner demonstrated getting in and out of the tub, could reach the water faucet, was able to regulate the water temperature, and could wash herself with a sponge. Petitioner was dressed adequately and appropriately when the screener arrived, and performed those tasks herself prior to the screener's arrival. Petitioner does not need help cutting her food, and can independently prepare her food. The screener saw Petitioner moving freely in her home. Petitioner went from her kitchen to her garage, and to her bedroom. The notes indicate that on June 26,

2014 Petitioner demonstrated to the FC team that she able to toilet on her own. Petitioner demonstrated to the screener that she was capable of transferring in and out of bed and from a sitting to a standing position. The screener indicated that Petitioner can microwave meals. The screener indicates that Petitioner is able to take her multiple medications related to her mental health. In fact the screener states that Petitioner purposefully takes more or less of her various medications depending on her desires for that particular day. Petitioner is able to make small money transaction to buy food and other items as required for daily living. Beyond this her mother manages her money. Petitioner takes her clothes to her mother's home to wash. Petitioner can independently use a phone as evidenced by the telephone hearing. Petitioner also owns and drives a car. This concerns the family care team, but even when eligible for family care, Petitioner refused to take advantage of any transportation assistance.

The crux of this case is that Petitioner may need help in her home related to her mental health issues, but not her physical limitations. Petitioner is able to physically perform the tasks of daily living. In fact, Petitioner has her 15 year old daughter living with her whom she is able to take care of. In order to qualify for family care, Petitioner must be functionally eligible due to physical impairments in conjunction with mental health issues. The information provided at the hearing show that Petitioner is able to physically perform all the tasks of daily living when she chooses to perform these tasks, therefore, she is functionally ineligible for the FC program.

### **CONCLUSIONS OF LAW**

The petitioner does not have care needs at the comprehensive functional capacity level at this time; therefore, she currently does not satisfy the functional eligibility requirements of the FC program.

**THEREFORE, it is**

**ORDERED**

That the Petition is dismissed.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

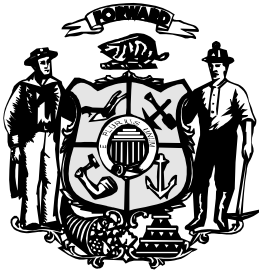
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 6th day of October, 2014

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\sCorinne Balter  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on October 6, 2014.

Milw Cty Dept Family Care - MCO  
Office of Family Care Expansion